No. 02-371

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

KEVIN LAMONT HICKS,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

25 pp

QUESTION PRESENTED

Amici will address the following question:

Whether a criminal defendant who has not engaged in speech or expressive conduct can bring a First Amendment overbreadth challenge to a conviction.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	5
A CRIMINAL DEFENDANT CANNOT CHALLENGE A CONVICTION UNDER THE OVERBREADTH DOCTRINE IF THE DEFENDANT DID NOT ENGAGE IN SPEECH OR EXPRESSIVE CONDUCT	5
A. The Overbreadth Doctrine Is A Limited Exception To Traditional Standing Rules Prohibiting The Assertion Of The Rights Of Third Parties	6
B. The Supreme Court of Virginia's Holding Is An Unprecedented And Erroneous Expansion Of This Court's Overbreadth Doctrine	10
CONCLUSION	20

TABLE OF AUTHORITIES

Cases — Page

Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970) 11
Broadrick v. Oklahoma, 413 U.S. 601 (1973) ..... *passim*
Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 7, 15
Gooding v. Wilson, 405 U.S. 518 (1972) 7, 8, 13, 17
HUD v. Rucker, 535 U.S. 125 (2002) 19
Los Angeles Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32 (1999) ..... *passim*
National Endowment for Arts v. Finley, 524 U.S. 569 (1998) 17
New York v. Ferber, 458 U.S. 747 (1982) ..... *passim*
Niemotko v. Maryland, 340 U.S. 268 (1951) ..... *passim*
Osborne v. Ohio, 495 U.S. 103 (1990) 10
Patsy v. Board of Regents, 457 U.S. 496 (1982) ... 18
Thornhill v. Alabama, 310 U.S. 88 (1940) 11
United States v. Raines, 362 U.S. 17 (1960) 7
Valley Forge Christian College v. Americans United, Etc., 454 U.S. 464 (1982) 3, 6, 11, 18
Younger v. Harris, 401 U.S. 37 (1971) 7, 19

Statutes

42 U.S.C. § 1983 18
42 U.S.C. § 1988 18
42 U.S.C. § 11901(3) 19
Va. Code § 18.2-119 13

TABLE OF AUTHORITIES—Continued

Other Authorities — Page

Abt Associates, Inc., *Public Housing Drug Elimination Program Resource Document: Case Studies Prepared for U.S. Department of Housing and Urban Development* (1994) 19
Drugs In Federally Assisted Housing: Hearing Before the Subcommittee on Housing And Urban Affairs of the Senate Committee on Banking, Housing, and Urban Affairs, 101st Cong. (1989) 19, 19-20
Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L. J. 853 (1991) 11
Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970) 9

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

Amici confront daily the problem of protecting communities from criminal activity, a pernicious dilemma in public housing. The Supreme Court of Virginia held that respondent, who has three prior convictions "for misconduct at Whitcomb Court—two for trespass and one for damaging property," Pet.13, could raise a First Amendment overbreadth challenge in this, his third prosecution for trespass. The court then reversed respondent's conviction notwithstanding that he was not engaged in expressive activity at the time of the incident.

This holding is an erroneous and socially harmful expansion of the overbreadth doctrine. It imposes significant costs on law-abiding citizens by denying the State the power to punish criminal activity. Yet it is unnecessary to protect First Amendment rights, which is the overbreadth doctrine's purpose.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resoiution of the case.

SUMMARY OF ARGUMENT

1. The Court has long recognized two fundamental rules of constitutional adjudication. The first is that constitutional rights "are personal and may not be asserted vicariously."

---

[1] The parties have consented to the filing of this brief *amicus curiae* and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973). The second is that a litigant whose conduct can be constitutionally proscribed cannot challenge a statute on the ground that it may be unconstitutionally applied to others not before the court. *See id.*

The Court has also recognized that the importance of the First Amendment warrants a limited exception to these rules. Thus, "when statutes regulate or proscribe speech . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 38 (1999) (citations and internal quotation marks omitted).

The overbreadth doctrine is not, however, "casually employed." *Id.* at 39. Indeed, while the case for an overbreadth challenge is strongest when a statute regulates speech, the Court has also recognized that indiscriminate use of the doctrine imposes a substantial social cost by denying the government the power to punish criminal activity. The Court has thus greatly limited overbreadth challenges when litigants have invoked the doctrine to challenge the application of the criminal laws, even to expressive conduct. The Court has further held that "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 770 (1982) (citations and internal quotation marks omitted).

2. While the overbreadth doctrine is an exception to the longstanding prohibition against litigating the rights of third parties, this limitation is only one of three prudential standing rules. Most significantly, the Court has repeatedly held that

in order to confer standing, a plaintiff's claim must "fall within the zone of interests to be protected . . . by the . . . constitutional guarantee in question." *Valley Forge Christian College v. Americans United, Etc.*, 454 U.S. 464, 475 (1982) (citations and internal quotatio.. marks omitted).

The overbreadth doctrine does not override this fundamental rule of constitutional adjudication. In the sixty years of the overbreadth doctrine's existence, the Court has never recognized the right of a litigant to bring an overbreadth challenge when the litigant's conduct did not involve expressive activity. Such a challenge would be irreconcilable with the Court's teaching that the "function" of an overbreadth challenge "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from pure speech toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Ferber*, 458 U.S. at 770 (citations and internal quotations omitted). Indeed, the function of an overbreadth challenge evaporates when the litigant has engaged in non-expressive criminal conduct. In such circumstances, there is no chilling of protected activity because the State's prosecution of non-expressive criminal conduct does not lead potential speakers to draw any inference concerning the government's regulation of speech.

The application of these principles to this case demonstrates that Hicks was not entitled to bring an overbreadth challenge. When confronted by the police, Hicks did not assert that he was on the Whitcomb Court grounds to engage in expressive activity. Rather, he stated he was "bringing pampers to his baby." Pet. App. 32a. Because Hicks' conduct is not within the "zone of interests" protected by the First Amendment, he is not entitled to bring a First Amendment overbreadth challenge to the Housing Authority's trespass-barment policy.

3. Beyond the fact that Hicks' conduct is not within the First Amendment's zone of interests, the record does not support a judicial prediction that the trespass-barment policy will chill others from engaging in protected activity. Contrary to the conclusion of the court below that Rogers (the manager of Whitcomb Court) has "unfettered discretion" to determine who can speak on the property, the record suggests that she referred those requests she was not comfortable granting to other authorities such as her supervisor, the Housing Authority's Assistant Director of Operations. *See* Pet. App. 101a-102a. The record also indicates that there was an established procedure for obtaining review of barment determinations. *See id.* at 62a. Moreover, there is no evidence that persons who sought to engage in expressive activity at Whitcomb Court were subject to criminal prosecution. *See id.* at 49a. There is thus no basis for concluding that facial invalidation of the policy is necessary to prevent the chilling of First Amendment rights, which is the purpose of the overbreadth doctrine.

Finally, the Court should reject Hicks' overbreadth challenge because the trespass-barment policy is not substantially overbroad. Criminal activity is a serious problem in public housing communities, both in Richmond and nationally. Several studies indicate that non-residents are responsible for the vast majority of criminal activity that occurs in public housing. It is thus an indisputably valid exercise of the police power to bar non-residents from Housing Authority grounds unless they have a legitimate social or business purpose for visiting. Indeed, the Housing Authority's exercise of power is no different from what many private landlords do to protect tenants by enforcing trespassing laws and regulating access to residential property. Given the tragically high crime rate that has afflicted Richmond's public housing tenants, the Housing Authority's purpose of keeping drug dealers, vandals, thieves and

murderers out of public housing projects demonstrates that the policy's "legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773.

ARGUMENT

A CRIMINAL DEFENDANT CANNOT CHALLENGE A CONVICTION UNDER THE OVERBREADTH DOCTRINE IF THE DEFENDANT DID NOT ENGAGE IN SPEECH OR OTHER EXPRESSIVE CONDUCT

The Supreme Court of Virginia erred in holding that respondent was entitled to a reversal of his conviction for trespassing on Richmond Redevelopment and Housing Authority (RRHA) property, on the ground that the Authority's "trespass policy is overly broad" and violates the First Amendment. Pet. App. 17a. Contrary to the views of the court below, this is not an appropriate case for judicial prescription of the "strong medicine" of the overbreadth doctrine. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Indeed, the manner in which the court below applied the doctrine was not only legally erroneous, but blatantly violated this Court's admonition just three years ago that "the overbreadth doctrine is not casually employed." *Los Angeles Police Dep't (LAPD) v. United Reporting Pub. Corp.*, 528 U.S. 32, 39 (1999).

As explained below, affirmance of the Virginia Supreme Court's use of the overbreadth doctrine to vacate respondent's conviction would mark an unprecedented expansion of the doctrine. Application of the doctrine to overturn respondent's criminal conviction for unlawful, non-expressive conduct would untether the doctrine from both its established purpose and core standing principles. In the approximately sixty years of the overbreadth doctrine's existence, this Court has never sanctioned its use by a litigant who did not seek to speak or otherwise engage in expressive conduct. This is because, as

this case demonstrates, application of the doctrine to invalidate a criminal conviction for non-expressive conduct imposes a significant cost on law-abiding citizens while being wholly unnecessary to protect First Amendment values. The judgment of the Virginia Supreme Court should therefore be reversed.

A. The Overbreadth Doctrine Is A Limited Exception To Traditional Standing Rules Prohibiting The Assertion Of The Rights Of Third Parties.

1. The Court has long recognized that the First Amendment overbreadth doctrine is an exception to the "traditional rules governing constitutional adjudication." *Broadrick*, 413 U.S. at 610. The first of these rules "is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Id.* (collecting cases). The second is the "closely related principle . . . that constitutional rights are personal and may not be asserted vicariously." *Id.* These rules reflect "two cardinal principles of our constitutional order: the personal nature of constitutional rights, and prudential limitations on constitutional adjudication." *New York v. Ferber*, 458 U.S. 747, 767 (1982) (internal citations omitted).

The rules serve several vital purposes. First, they improve the quality of judicial decisionmaking. As the Court has explained, "the legal questions presented to the court [should] be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982). Thus, "'[b]y focusing on the factual situation before us, and similar cases necessary for the development of a constitutional rule, [the court] face[s] "flesh

and blood" legal problems with data "relevant and adequate to an informed judgment."'" *LAPD*, 528 U.S. at 39 (quoting *Ferber*, 458 U.S. at 768).

Second, the rules preserve the independence of the legislative and executive branches by ensuring that the courts do not act as "roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S. at 611. The overbreadth doctrine is strictly circumscribed because allowing litigants to bring overbreadth challenges to statutes in any but the most compelling circumstances would result in "the States [being] stripped of all power to prosecute even the socially dangerous and constitutionally unprotected conduct that had been covered by the statute, until a new statute could be passed by the state legislature and approved by the . . . courts." *Younger v. Harris*, 401 U.S. 37, 51 (1971). It is a substantial encroachment on legislative prerogatives to invalidate a statute on its face when the statute can be constitutionally applied to a litigant. *Cf. Ferber*, 458 U.S. at 769. "Absent 'weighty countervailing' circumstances," the Court has "adhered to" these rules. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

2. The Court has recognized that the importance of First Amendment values within the constitutional scheme warrants a limited exception to the traditional limitations on constitutional adjudication. As the Court recently reiterated, "'[a]t least when statutes regulate or proscribe speech . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *LAPD*, 528 U.S. at 38 (quoting *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972)) (other quotation and citation omitted). The Court has further explained that the

First Amendment overbreadth doctrine "'is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a statute susceptible of application to protected expression.'" *Id.* (quoting *Gooding*, 405 U.S. at 520-21).

The Court has made clear that "like most exceptions to established principles," the overbreadth doctrine's use "must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted." *Ferber*, 458 U.S. at 769. Recognizing "the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment," *id.*, application of the overbreadth doctrine "is, manifestly, strong medicine[,]" and "has been employed by the Court sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613.

The case for facial invalidation is strongest when a statute regulates speech. *See id.* "Equally important, overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct." *Id.*

As the Court has further explained, the justification for allowing overbreadth challenges "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Id.* at 615. Accordingly, even though "such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." *Id.* The Court has

thus "held that 'particularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Ferber*, 458 U.S. at 770 (quoting *Broadrick*, 413 U.S. at 615).

"The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine." *Ferber*, 458 U.S. at 772. Indeed, in most of this Court's cases "involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression." *Id.* at 771. Nearly every statute can conceivably be applied in some unconstitutional manner. Therefore, unless a statute "reaches a substantial number of impermissible applications[,]" it cannot be presumed that the law "'set[s] up the kind and degree of chill that is judicially cognizable.'" *Id.* at 771-72 & n.27 (quoting Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 859 n.61 (1970)).[2]

3. Because of the high societal costs of allowing those who engage in criminal conduct to escape punishment, the Court has further instructed that courts should determine whether less intrusive measures can resolve a First Amendment problem. Thus, when faced with an overbreadth challenge a court should attempt to give a statute a narrowing construction to avoid a First Amendment question. *See Ferber*, 458 U.S. at 769 n.24. "Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. *Broadrick*, 413 U.S. at 613 (collecting cases).

Moreover, even when a statute "is not subject to a narrowing construction and is impermissibly overbroad, it

---

[2] The requirement of substantial overbreadth is as "justifiably . . . applied to statutory challenges which arise in defense of a criminal prosecution as well as civil enforcement or actions seeking a declaratory judgment." *Ferber*, 458 U.S. at 772-73.

nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated." *Ferber*, 458 U.S. at 769 n.24. When either a narrowing construction or partial invalidation result in "the invalid reach of the law [being] cured, there is no longer reason for proscribing the statute's application to unprotected conduct." *Id.; see also Broadrick*, 413 U.S. at 613; *Osborne v. Ohio*, 495 U.S. 103, 113-14 (1990) (rejecting overbreadth challenge on grounds that state court had construed statute in manner that "plainly survives strict scrutiny"). Accordingly, it is "the normal rule that partial, rather than facial, invalidation is the required course." *Brockett*, 472 U.S. at 504.

B. The Supreme Court of Virginia's Holding Is An Unprecedented and Erroneous Expansion Of This Court's Overbreadth Doctrine

The Supreme Court of Virginia held that respondent is entitled to challenge his criminal conviction by asserting a First Amendment overbreadth challenge to the Richmond Housing Authority's trespass-barment policy. The court did so notwithstanding that respondent, who has two prior convictions for trespassing and one prior conviction for damaging property at Whitcomb Court, made no claim to the police that he was on the property to engage in expressive activity at the time of his offense. Contrary to the views of the court below, this Court's cases do not support such casual use of the overbreadth doctrine. Indeed, to allow an overbreadth challenge under the facts of this case would lead to an unprecedented and erroneous expansion of the doctrine. The judgment of the Supreme Court of Virginia should therefore be reversed.

1. As discussed above, the overbreadth doctrine "is an exception to the traditional rule that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court.'" *LAPD*, 528 U.S. at 39 (quoting *Ferber*, 458 U.S. at 767 (citing *Broadrick*, 413 U.S. at 610)). The prohibition against litigating the rights of third parties is, however, only one of the three prudential standing limitations recognized by this Court.

Most significantly, the Court has repeatedly held that in order to confer standing, a plaintiff's claim must "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge Christian College v. Americans United, Etc.*, 454 U.S. 464, 475 (1982) (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). The overbreadth doctrine does not override this fundamental rule of constitutional adjudication.

The Court has recognized the overbreadth doctrine for more than sixty years. *See* Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 863 & n.58 (1991) (tracing doctrine's origin to *Thornhill v. Alabama*, 310 U.S. 88 (1940)). In *Thornhill*, the overbreadth challenger, who had been convicted of loitering and picketing, was engaged in expressive activity. *See* 310 U.S. at 91-95. Thornhill's challenge thus was clearly within the zone of interests protected by the First Amendment. *See id.* at 102.

Since *Thornhill* the Court has not recognized the right of a litigant to bring an overbreadth challenge when the litigant's conduct did not involve expressive activity. Indeed, allowing such a challenge is irreconcilable with this Court's teaching that the "function" of an overbreadth challenge "'attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—*even if expressive*—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls

over harmful, constitutionally unprotected conduct.'" *Ferber*, 458 U.S. at 770 (quoting *Broadrick*, 413 U.S. at 615) (emphasis added).

If the function of an overbreadth challenge attenuates as proscribed activity moves from pure speech to expressive conduct, it evaporates when the litigant engages in non-expressive criminal conduct. To allow a criminal defendant to bring an overbreadth challenge when his conduct does not involve expressive conduct, much less speech, imposes a substantial social cost by denying the State the power to punish "conduct that is admittedly within its power to proscribe" and to protect the community. *Id.* (quoting *Broadrick*, 413 U.S. at 615). Non-expressive criminal conduct therefore falls outside the scope of the over-breadth doctrine.

Indeed, the justification for allowing an overbreadth challenge does not exist where, as here, a State criminally prosecutes a person for engaging in non-expressive conduct. When the State prosecutes a person for engaging in expressive but unprotected conduct, it is sometimes reasonable for a court to predict that other potential speakers will be deterred because they perceive that the government will prosecute them for engaging in speech or protected activity. In contrast, when the State prosecutes non-expressive conduct, potential speakers are not likely to draw any inference concerning the government's regulation of speech. The only reasonable inference is that the government is likely to prosecute persons who engage in criminal activity.

When asked by a police officer why he was on Whitcomb Court grounds, Hicks did not say that he was there to engage in expressive activity. Rather, he stated that he was "bringing pampers to his baby," Pet. App. 32a, conduct that clearly does not implicate the First Amendment. Virginia's prosecution of Hicks for trespassing is thus unlikely to chill speakers from exercising their First Amendment rights. Because Hicks' conduct is not within the zone of interests protected by the

First Amendment, he is not entitled to bring a First Amendment overbreadth challenge to the Housing Authority's trespass-barment policy.

2. The Supreme Court of Virginia erred in sustaining Hicks' challenge for two additional reasons. First, the record does not support a judicial prediction that the trespass-barment policy will cause other "'persons whose expression is constitutionally protected [to] refrain from exercising their right for fear of'" being subject to some sanction. *LAPD*, 528 U.S. 32, 38 (quoting *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972)). Second, even if the trespass-barment policy results in the unconstitutional suppression of some protected expressive activity, the policy's overbreadth is insubstantial when "judged in relation to the [policy's] plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

While Hicks was convicted of violating Virginia's criminal trespass statute, *see* Va. Code § 18.2-119, his overbreadth challenge is not to this statute but rather to the unwritten portion of the Housing Authority's trespass-barment policy. *See* Pet. App. 2a, 13a-14a; *see also* Opp. 1. But to the extent this Court's cases contemplate an overbreadth challenge to an unwritten policy such a challenge will, as this case demonstrates, frequently be unfounded.

The Supreme Court of Virginia relied on *Niemotko v. Maryland*, 340 U.S. 268 (1951), to support the proposition that Hicks was entitled to bring a facial challenge to the Authority's policy "even though a portion of that policy is unwritten." Pet. App. 13a-14a. While an unwritten policy was at issue in *Niemotko*, *see* 340 U.S. at 269-70, the case did not involve an overbreadth challenge. Rather, *Niemotko* involved a classic, as applied, First Amendment challenge. Moreover, in stark contrast to this case, the litigants in *Niemotko* established the scope and substance of the challenged policy with clarity. And in *Niemotko*, there was extensive evidence that protected expression had been

prohibited solely based on its content, a paradigmatic First Amendment violation. *See* 340 U.S. at 272.

In *Niemotko*, the Court reversed the convictions of two members of a religious group who were convicted of disorderly conduct after they conducted a bible talk in a public park without obtaining a permit. *See generally* 340 U.S. at 269-73. The city did not have an ordinance regulating use of the park. *Id.* at 269. The Court noted, however, that "it has been the custom for organizations and individuals desiring to use [the park] for meetings and celebrations of various kinds to obtain permits from the Park Commissioner." *Id.* Moreover, it was also "the custom of the municipality [that] there is a right of appeal to the City Council from the action of the Park Commissioner." *Id.* at 270.

The sect members first unsuccessfully applied to the Park Commissioner for a permit. *Id.* at 269. They then filed an appeal with the City Council, which denied their request after a public hearing. *Id.* at 270. Thereafter, the sect members proceeded to hold two separate meetings in the Park; each of the two members was arrested upon the commencement of each meeting and charged with disorderly conduct for using the park without a permit. *Id.* Following a jury trial, both sect members were convicted. *Id.*

This Court reversed the convictions. The Court began by noting that "[a]t the time of the arrest of each of these appellants, there was no evidence of disorder, threats of violence or riot. There was no indication that the appellants conducted themselves in a manner which could be considered as detrimental to the public peace or order[,]" and the police had testified "that each of the appellants had conducted himself in a manner beyond reproach." *Id.* at 271. The Court thus concluded that it was "quite apparent that any disorderly conduct which the jury found must have been based on the fact that appellants were using the park without a permit." *Id.*

The Court then turned to whether the City's permit system was constitutional. The Court explained that "all that is here is an amorphous 'practice,' whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served." *Id.* at 271-72. Noting specifically that the Mayor had testified that "within his memory permits had always been issued for religious organizations and Sunday-school picnics," *id.* at 272-73, and that the City had granted a permit to the Elks to hold a Flag Day ceremony in the park on one of the days for which the sect had sought a permit, *id.* at 273, the Court reached the "inescapable" conclusion "that the use of the park was denied because of the City Council's dislike for or disagreement with the [Jehovah's] Witnesses or their views." *Id.* at 272.

The conduct of the two sect members in *Niemotko* clearly was protected, expressive activity, and could not be proscribed based on officials' disagreement with their views. *Niemotko* was thus not an overbreadth case, but rather, an as applied challenge. *See Brockett*, 472 U.S. at 504. And as the Court made clear in *Brockett*, an overbreadth challenge is not appropriate "where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish." *Id. Niemotko* thus does not support an overbreadth challenge to an unwritten policy.

Moreover, even assuming that the Court's cases contemplate overbreadth challenges to unwritten policies (in addition to as applied challenges), overbreath challenges can be highly problematic because they lack the factual development necessary to determine the scope and substance of the policy. For example, while in *Niemotko* the Court was required to determine the contours of an unwritten policy, the fact that the case arose out of a concrete application of the policy ensured adequate development of the record. Indeed, in

Niemotko, the record included the testimony of the Mayor, an official who clearly possessed policy-making authority over the city's parks. *See* 340 U.S. at 272-73.

In this case, by contrast, no such certainty exists with respect to the policy at issue. Here, the Supreme Court of Virginia relied on excerpts of the testimony of a single RRHA employee—Rogers, the Whitcomb Court housing manager, who manages just one of the Housing Authority's developments—to determine the scope of the Authority's trespass-barment policy.[3] *See* Pet. App. 14a.

"Based upon the record before [the c]ourt," *id.* at 16a, the Virginia Supreme Court concluded that Rogers was "the government official who determines whether an individual is authorized" to "use the property." *Id.* at 14a. The court then selectively read Rogers' testimony, asserting that the record demonstrated that:

> Rogers has *the unfettered discretion* to determine not only who has a right to speak on the Housing Authority's property, but she may prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment. She may even prohibit speech that is political or religious in nature.

Pet. App. 16a (emphasis added). *But cf. id.* at 21a (Kinser, J., dissenting) (RRHA's policy "is not aimed at censoring particular groups or viewpoints, or prohibiting individuals from distributing leaflets . . . . It seeks to regulate the criminal act of trespassing.").

Rogers' testimony does not, however, establish that she has unfettered discretion to suppress expressive activity. While her testimony was that she sometimes did not affirmatively

[3] The trial court did not hear any testimony from other RRHA officials, such as Rogers' supervisor.

grant permission to potential speakers, Rogers simultaneously explained (in a passage not cited by the majority opinion) that she referred some requests to other decisionmakers. *See id.* at 101a.

Rogers testified that she referred some matters to the "community council," *id.*, and some matters to her supervisor, the assistant director of housing operations. *See id.* at 102a. Nothing in the record indicates that Rogers failed to forward requests that she did not affirmatively grant to these other decisionmakers, let alone did so on the basis of their content. *See* Pet. App. 98a-103a. Moreover, Rogers "indicated that there was a process for having a barment lifted by submitting a written request through the Authority's director of housing operations." *Id.* at 62a (opinion of Virginia Court of Appeals).

The record thus clearly does not support the pivotal conclusion of the majority below: that "Rogers has the *unfettered discretion* to determine . . . who has a right to speak on the Housing Authority's property." Pet. App. 16a (emphasis added). Furthermore, the fact that Rogers did not herself grant access to every person requesting it does not mean that these persons were prohibited from speaking and threatened with arrest if they did so. *See id.* at 101a; *see also id.* at 49a (Virginia Court of Appeals en banc) (Humphreys, J., dissenting).

Based on this record, no court can predict with confidence that the trespass-barment policy will "cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612. By contrast, in a typical overbreadth case, there must be a reasonable probability that governmental authorities will criminally prosecute those who violate the statute. *See LAPD*, 528 U.S. at 40-41 (discussing *Gooding* and *National Endowment for Arts v. Finley*, 524 U.S. 569 (1998)).

Thus, while Hicks—a convicted vandal and trespasser—was subjected to criminal prosecution, there is no evidence that any person who sought to engage in expressive activity at Whitcomb Court was subjected to similar treatment. In fact, as the dissenting opinion in the *en banc* court of appeals recognized, "unauthorized individuals are *not automatically arrested*, but . . . are warned that they are not to enter the property in the future." Pet. App. 49a (emphasis added); *cf. LAPD*, 528 U.S. at 41 (rejecting facial challenge on ground that "[n]o threat of prosecution . . . or cutoff of funds . . . hangs over [the] heads" of parties not before the Court; "They may seek access under the statute on their own just as respondent did, without incurring any burden other than the prospect that their request will be denied.").

Moreover, there is no reason to allow Hicks to bring an overbreadth challenge on behalf of those who seek to engage in expressive activity, because in the event a potential speaker is denied permission to enter Whitcomb Court they can sue for injunctive relief, *see* 42 U.S.C. § 1983, and, if successful, obtain attorneys' fees.[4] *See id.* § 1988. Given the remedies available to those who may unsuccessfully seek to engage in expressive activity on RRHA property, the "strong medicine" of overbreadth is not necessary to cure any potential chill to First Amendment rights caused by RRHA's trespass policy.

Indeed, because such a suit will be based on the Authority's actual application of the policy to a prospective speaker, the courts will decide the case based not on speculation, but rather on "a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. In such an as applied challenge, the constitutional question of whether the Authority's policy

---

[4] Under this Court's section 1983 jurisprudence, a potential speaker is not required to exhaust the Housing Authority's administrative remedies. *See, e.g., Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982).

violates the First Amendment will be clearly framed. *See, e.g., Niemotko*, 340 U.S. at 271-73. And even if the lower courts ultimately determine that it does, an as applied challenge will not impose the heavy cost of stripping the Authority of power to enforce its trespass-barment policy against those persons, such as Hicks, who engage in criminal conduct. *See Younger*, 401 U.S. at 51; *cf. Ferber*, 458 U.S. at 769 n.24 (courts should give limiting construction to laws challenged on overbreadth grounds).

3. Finally, the Court should reject Hicks' overbreadth challenge because the Housing Authority's trespass-barment policy is not substantially overbroad. *See Broadrick*, 413 U.S. at 615. As explained below, the policy's potential to chill speech is insubstantial when "judged in relation to [its] plainly legitimate sweep" and thus the policy does not warrant facial invalidation. *Id.*

Criminal activity is a serious problem in public housing communities, both in Richmond and in numerous other cities nationwide. *See HUD v. Rucker*, 535 U.S. 125, 127 (2002) (quoting 42 U.S.C. § 11901(3)); Br. *Am. Cur.*, City of Richmond & RRHA on pet., 1-9. Moreover, in Richmond as elsewhere non-residents are responsible for "the vast majority of crimes" that occur in public housing. *See* Pet. App. 3a; Abt Associates Inc., *Public Housing Drug Elimination Program Resource Document: Case Studies Prepared for U.S. Department of Housing and Urban Development* 83-84 (1994) (discussing public housing in Dade County, Florida). *See also Drugs In Federally Assisted Housing: Hearing Before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking, Housing, and Urban Affairs*, 101st Cong. 110 (1989) (statement of Director of Chicago Housing Authority that in late 1980's, "80 percent of [Chicago Housing Authority] crime [was] committed by unauthorized or nonresidents"); *id.* at 134 (1989) (statement of James Moran, then-mayor of Alexandria, Va., July 20,

1989) ("[T]he vast majority of public housing tenants . . . are law abiding residents . . . who are not involved in illegal drug activities."). *See also* Pet. App. 3a.

Given that most crimes in public housing are committed by non-residents, it is an indisputably valid exercise of the police power to bar non-residents from Housing Authority grounds unless they have a legitimate social or business purpose for visiting. Indeed, the Housing Authority's trespass policy is no different from what many private landlords do to protect tenants by enforcing trespass laws and regulating access to residential property. Given the tragically high crime rate that has afflicted Richmond's public housing tenants, RRHA's purpose of keeping drug dealers, vandals, rapists, thieves, and murderers out of the city's public housing developments demonstrates that the policy's "legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773.

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

March 7, 2003